

Honorable Robert J. Bryan

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

Angela Kee
5312 S. Cedar St.
Tacoma, WA 98409

and

Angela Gustin
7827 S. Ainsworth Ave.
Tacoma, WA 98408

Plaintiff,

v.

Evergreen Professional Recoveries, Inc.
c/o Kenneth A. Ross, Registered Agent
12100 NE 195th St. #325
Bothell, WA 98011

Defendant.

No. C09-5130 RJB

DEFENDANT'S MOTION FOR
PARTIAL SUMMARY
JUDGMENT
(DISMISSAL OF CLAIMS OF
KEE ONLY)

NOTE ON MOTION CALENDAR:
FRIDAY, AUGUST 14, 2009

**I.
NATURE OF MOTION**

DEFENDANT'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT - 1
C09-5130 RJB

Luke, Casteel & Olsen, PSC
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Lynnwood, WA 98037
425-744-0411
425-771-3490 (Facsimile)

1 Defendant moves for partial summary judgment under Rule 56 as Plaintiff Kee
2 is judicially estopped from pursuing claims which she did not list in her Bankruptcy
3 case.
4

5 **II.**
6 **UNDISPUTED FACTS**

7 The alleged FDCPA violations giving rise to this cause of action occurred in
8 2008. Ms. Kee, through her counsel, sent a demand letter to Defendant in
9 September, requesting compensation of \$10,000. Plaintiffs filed this FDCPA case
10 on March 9, 2009. However, prior to this filing, Plaintiff Kee commenced Chapter
11 7 Bankruptcy proceedings under Cause No. 09-40947-PBS. Ms. Kee's petition
12 was filed on February 13, 2009. She listed over \$12,000 in unsecured debt,
13 including her debt to Defendant., but nowhere in her schedule of assets did she list
14 an FDCPA claim or any other cause of action. The Trustee filed a "No Distribution
15 Report" on April 28, 2009. Ms. Kee received a discharge on June 2, 2009 and the
16 case was closed on June 8, 2009
17
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19
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21 Defendant's counsel wrote to Ms. Kee's counsel on June 17, 2009 and
22 requested that Ms. Kee voluntarily dismiss her claims, based on judicial estoppel.
23 Ms. Kee subsequently filed "Amended Schedules" listing the value of her FDCPA
24

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27 FOR PARTIAL SUMMARY
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1 claim at \$3,000.

2
3 **III.**
4 **ARGUMENT AND LEGAL AUTHORITY**

5 The purpose of summary judgment is to avoid unnecessary trials where no
6 dispute exists as to the material facts of the case. *Zweig v. Hearst Corp.*, 521 F.2d
7 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025 (1975). Summary judgment should be
8 granted in this case as Plaintiff Kee is judicially estopped from pursuing her claims.
9

10
11 Judicial estoppel an equitable doctrine that precludes a party from gaining an
12 advantage by asserting one position, and then later taking, to her benefit, a clearly
13 inconsistent position. See *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d
14 597, 600-601 (9th Cir. 1996). Judicial estoppel may be invoked not only to prevent
15 a party from gaining an advantage by taking inconsistent positions, but also because
16 of "general consideration[s] of the orderly administration of justice and regard for
17 the dignity of judicial proceedings," and to "protect against a litigant playing fast
18 and loose with the courts." *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).
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22 The court considers three factors in deciding whether to exercise its
23 discretion in applying the doctrine of judicial estoppel in a particular case. *New*
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1 *Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001); *Hamilton v. State Farm Fire &*
2 *Cas. Co.*, 270 F.3d 778, 782-83 (9th Cir. 2001). "First, a party's later position must
3 be 'clearly inconsistent' with its earlier position." *Hamilton*, at 782. Second, the
4 party must have "succeeded in persuading a court to accept that party's earlier
5 position, so that judicial acceptance of an inconsistent position in a later proceeding
6 would create 'the perception that either the first or the second court was misled.'" *Id.*
7 Third, the court must determine "whether the party seeking to assert an inconsistent
8 position would derive an unfair advantage or impose an unfair detriment on the
9 opposing party if not estopped." *Id.* at 783.

10
11 The Ninth Circuit has applied judicial estoppel in the bankruptcy context to
12 prevent plaintiffs from asserting relevant claims that they failed to disclose during
13 bankruptcy proceedings. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778,
14 784 (9th Cir. 2001); *Hay v. First Interstate Bank of Kalispell*, 978 F.2d 555 (9th
15 Cir. 1992). "In the bankruptcy context, a party is judicially estopped from asserting
16 a cause of action not raised in a reorganization plan or otherwise mentioned in the
17 debtor's schedules or disclosure statements." *Hamilton*, at 783 (citing *Hay*, at 557).

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19 Other Circuits follow this doctrine as well. *In re Coastal Plains, Inc.*, 179
20 F.3d 197, 208 (5th Cir. 1999), *Oneida Motor Freight, Inc. v. United Jersey Bank*,

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DEFENDANT'S MOTION
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1 848 F.2d 414, 419 (3d Cir. 1988).

2 Plaintiff Kee clearly asserted inconsistent positions in the two proceedings.
3
4 She failed to list the FDCPA claim against Defendant as an asset on her bankruptcy
5 schedule and received a discharge, but clearly knew of her claim prior to the
6 bankruptcy filing. She later brought this suit against Defendant on the same claim.
7

8 At the commencement of bankruptcy the debtor must disclose all of her
9 assets to be included in the bankruptcy estate for the benefit of creditors. 11 USC §
10 521(a)(1); see also *Cusano v. Klein*, 264 F.3d 936, 945-46 (9th Cir. 2001). The
11 bankruptcy estate includes all the debtor's potential claims or causes of action that
12 existed at the time she filed for bankruptcy. 11 U.S.C. § 541(a)(1); see also *In re*
13 *Swift*, 129 F.3d 792, 795 (5th Cir. 1997); *Coastal Plains*, 179 F.3d at 207-08.
14
15

16 Here, Plaintiff Angela Kee, in her voluntary petition, stated under penalty of
17 perjury:
18

19 "Other contingent and unliquidated claims of every nature . . . "
20 "None."

21 *Declaration of Counsel, Ex. 2 (Schedule B of Petition)*

22 Ms. Kee did not list an FDCPA claim (or any other cause of action)
23
24 anywhere in her bankruptcy schedules, although she knew of the alleged claim(s)
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26 DEFENDANT'S MOTION
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1 prior to her Chapter 7 petition filing date of February 13, 2009. Therefore, she is
2 now judicially estopped from asserting a cause of action that she did not disclose to
3 the Bankruptcy Court, the U.S. Trustee or her creditors.
4

5 The fact that Ms. Kee filed Amended Schedules (which represent the claim
6 as worth \$3,000 rather than the \$10,000 she demanded pre-suit) has no bearing on
7 the judicial estoppel. In a strikingly similar case it was noted:
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9 "Plaintiff Allers-Petrus, filed her bankruptcy petition with full
10 knowledge that she had a FDCPA claim against Columbia.
11 Plaintiff did not seek to amend her schedule of assets until after
12 her plan had been confirmed[.] It is the failure to disclose assets
13 on her bankruptcy schedules that provides the most compelling
reason to bar the prosecution of her claims".

14 *Order Granting Defendant's Motion for Summary Judgment,*
15 *Allers-Petrus v. Columbia Recovery Group, LLC,*
16 Cause No. C08-5533 FDB, Western Dist. of Washington at Tacoma.

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18 **III.**
19 **CONCLUSION**

20 Defendant requests that partial summary judgment be granted, dismissing the
21 claims of Plaintiff Kee, and that Defendant be allowed to move for an award of fees
22 and costs.
23

24 DATED THIS 24th day of July, 2009.

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26 DEFENDANT'S MOTION
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LUKE, CASTEEL & OLSEN, PSC

/s/ Kimberlee Walker Olsen

Kimberlee Walker Olsen, WSBA # 28773
Attorney for Defendant

CERTIFICATE OF SERVICE

I, Kimberlee Walker Olsen, certify that on July 24, 2009, I electronically sent, via ECF, true and correct copies of:

1. Defendant's Motion for Summary Judgment/Note on Motion Calendar;
2. Declaration of Counsel with attached Exhibits 1-5; and
3. [Proposed] Order Granting Defendants' Motion for Summary

to the following:

Richard J. Meier, rjm@legalhelpers.com
Lawrence Lofgren, llo@legalhelpers.com
Attorneys for Plaintiffs Kee and Gustin

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DEFENDANT'S MOTION
FOR PARTIAL SUMMARY
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